

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 06, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEPHANIE W. O/B/O
JONATHAN W.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:18-cv-00052-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 15, 16

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No. 7. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's Motion, ECF No. 15, and grants Defendant's Motion, ECF No. 16.

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
2 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
4 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within
9 the meaning of the Social Security Act. First, the claimant must be “unable to
10 engage in any substantial gainful activity by reason of any medically determinable
11 physical or mental impairment which can be expected to result in death or which
12 has lasted or can be expected to last for a continuous period of not less than twelve
13 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
14 impairment must be “of such severity that he is not only unable to do his previous
15 work[,] but cannot, considering his age, education, and work experience, engage in
16 any other kind of substantial gainful work which exists in the national economy.”
17 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
20 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner

1 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
2 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(b), 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
8 claimant suffers from "any impairment or combination of impairments which
9 significantly limits [his or her] physical or mental ability to do basic work
10 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
11 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
12 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
13 §§ 404.1520(c), 416.920(c).

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant's age,
19 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
3 work, analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
8 capable of performing other work; and (2) such work “exists in significant
9 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2);
10 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 On March 31, 2014, Plaintiff¹ filed applications for Title II disability
13 insurance benefits and Title XVI supplemental security income benefits, alleging
14 on onset date of March 31, 2014. Tr. 1119-38. The applications were denied
15 initially, Tr. 1062-66, and on reconsideration, Tr. 1068-71. Plaintiff appeared at a
16 hearing before an administrative law judge (ALJ) on September 22, 2016. Tr. 959-
17 1013. On October 18, 2016, the ALJ denied Plaintiff’s claims. Tr. 51-77.

18
19 ¹ The claimant died on May 12, 2017. ECF No. 15 at 8. This opinion will refer to
20 the claimant as Plaintiff.

1 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
2 activity since March 31, 2014, the alleged onset date. Tr. 57. At step two, the ALJ
3 found Plaintiff had the following severe impairments: lumbar and cervical
4 degenerative disc disease, left shoulder acromioclavicular joint osteoarthritis,
5 osteoarthritis of the bilateral hands, IBS, bilateral carpal tunnel and ulnar
6 neuropathy, COPD, and GERD. *Id.* At step three, the ALJ found Plaintiff did not
7 have an impairment or combination of impairments that meets or medically equals
8 the severity of a listed impairment. Tr. 61. The ALJ then concluded that Plaintiff
9 had the RFC to perform light work with the following limitations:

10 [Plaintiff] is able to walk for four hours total in an eight-hour workday with
11 normal breaks; he cannot climb ladders, ropes, or scaffolds, and can only
12 occasionally perform all other postural activities; he is limited to occasional
13 overhead reaching with the left upper extremity; he is limited to frequent
14 fingering and occasional feeling; he is limited to handling no more than fifty
percent of the workday; he requires ready access to a restroom throughout
the workday; he can have only occasional exposure to extreme cold or heat,
vibration, or pulmonary irritants; and he can have no exposure to hazards,
such as unprotected heights or moving mechanical parts.

15 Tr. 62.

16 At step four, the ALJ found Plaintiff was unable to perform any past relevant
17 work. Tr. 70. At step five, the ALJ found that, considering Plaintiff's age,
18 education, work experience, RFC, and testimony from a vocational expert, there
19 were other jobs that existed in significant numbers in the national economy that
20 Plaintiff could perform, such as production assembler, electronics worker, or mail

1 clerk. Tr. 71. The ALJ concluded Plaintiff was not under a disability, as defined
2 in the Social Security Act, from March 31, 2014, through October 18, 2016, the
3 date of the ALJ's decision. Tr. 72.

4 On December 13, 2017, the Appeals Council denied review, Tr. 1-7, making
5 the ALJ's decision the Commissioner's final decision for purposes of judicial
6 review. *See* 42 U.S.C. § 1383(c)(3).

7 **ISSUES**

8 Plaintiff seeks judicial review of the Commissioner's final decision denying
9 him disability income benefits under Title II and supplemental security income
10 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
11 issues for this Court's review:

- 12 1. Whether the ALJ properly weighed Plaintiff's symptom claims;
- 13 2. Whether the ALJ properly weighed the medical opinion evidence;
- 14 3. Whether the ALJ properly found depression was not a severe impairment
15 at step two; and
- 16 4. Whether the ALJ properly found at step five that Plaintiff was capable of
17 performing other work in the national economy.

18 ECF No. 15 at 11.

DISCUSSION

A. Plaintiff's Symptom Claims

Plaintiff faults the ALJ for failing to rely on reasons that were clear and convincing in discrediting his subjective symptom claims. ECF No. 15 at 15-16. An ALJ engages in a two-step analysis to determine whether to discount a claimant's testimony regarding subjective symptoms.² SSR 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted). "The claimant is not required to show that [his] impairment could reasonably be expected to cause the severity of the symptom []he has alleged; []he

² At the time of the ALJ's decision in October 2016, the regulation that governed the evaluation of symptom claims was SSR 16-3p, which superseded SSR 96-7p effective March 24, 2016. SSR 16-3p; Titles II and XVI: Evaluation of Symptoms in Disability Claims, 81 Fed. Reg. 15776, 15776 (Mar. 24, 2016). The ALJ's decision did not cite SSR 16-3p, but cited SSR 96-4p, which was rescinded effective June 14, 2018, in favor of the more comprehensive SSR 16-3p. Neither party argued any error in this regard.

1 need only show that it could reasonably have caused some degree of the
2 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

3 Second, “[i]f the claimant meets the first test and there is no evidence of
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of
5 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
6 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
7 omitted). General findings are insufficient; rather, the ALJ must identify what
8 symptom claims are being discounted and what evidence undermines these claims.
9 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v.*
10 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
11 explain why it discounted claimant’s symptom claims). “The clear and convincing
12 [evidence] standard is the most demanding required in Social Security cases.”
13 *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r*
14 *of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

15 Factors to be considered in evaluating the intensity, persistence, and limiting
16 effects of an individual’s symptoms include: 1) daily activities; 2) the location,
17 duration, frequency, and intensity of pain or other symptoms; 3) factors that
18 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
19 side effects of any medication an individual takes or has taken to alleviate pain or
20 other symptoms; 5) treatment, other than medication, an individual receives or has

1 received for relief of pain or other symptoms; 6) any measures other than treatment
2 an individual uses or has used to relieve pain or other symptoms; and 7) any other
3 factors concerning an individual's functional limitations and restrictions due to
4 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §§
5 404.1529, 416.929 (2011). The ALJ is instructed to "consider all of the evidence
6 in an individual's record," "to determine how symptoms limit ability to perform
7 work-related activities." SSR 16-3p, 2016 WL 1119029, at *2.

8 The ALJ found that Plaintiff's medically determinable impairments could
9 reasonably be expected to cause the alleged symptoms, but that Plaintiff's
10 statements concerning the intensity, persistence, and limiting effects of his
11 symptoms were not entirely consistent with the evidence. Tr. 63.

12 *1. Lack of Supporting Medical Evidence*

13 The ALJ found Plaintiff's symptom complaints were not supported by the
14 objective medical evidence. Tr. 63-65. An ALJ may not discredit a claimant's
15 symptom testimony and deny benefits solely because the degree of the symptoms
16 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261
17 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.
18 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400
19 F.3d 676, 680 (9th Cir. 2005). However, the medical evidence is a relevant factor
20 in determining the severity of a claimant's symptoms and their disabling effects.

1 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2) (2011).

2 Here, the ALJ considered Plaintiff's individual symptom complaints and noted
3 where the medical evidence failed to corroborate Plaintiff's symptom complaints.
4 Tr. 63-65; *see, e.g.*, Tr. 1219 (normal gait); Tr. 1251 (full range of motion in
5 extremities and spine; full strength); Tr. 1265 (mildly decreased range of motion in
6 back); Tr. 1276 (full range of motion in knees); Tr. 1282 (mildly reduced range of
7 motion in back); Tr. 1422 (mildly decreased range of motion in shoulder). Plaintiff
8 failed to challenge the ALJ's findings, thus, challenge to those findings is waived.
9 *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir.
10 2008) (determining Court may decline to address on the merits issues not argued
11 with specificity); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the Court may
12 not consider on appeal issues not "specifically and distinctly argued" in the party's
13 opening brief).

14 Plaintiff's only assignment of error to the ALJ's evaluation of Plaintiff's
15 symptom testimony is to argue that the ALJ failed to discuss Plaintiff's allegations
16 of nausea and to cite medical evidence³ to support Plaintiff's claims. ECF No. 15

17 _____
18 ³ The Court notes that a substantial portion of the evidence Plaintiff cites is
19 evidence that the Appeals Council declined to consider and exhibit. Tr. 2. Where
20 the Appeals Council refuses to consider additional evidence, the evidence is not

1 at 16. Even if Plaintiff were to establish error here, such error would be harmless
2 because the ALJ provided other legally sufficient reasons, discussed *infra*, to
3 discount Plaintiff's symptom claims. *See Carmickle*, 533 F.3d at 1163 (upholding
4 an adverse credibility finding where the ALJ provided four reasons to discredit the
5 claimant, two of which were invalid); *Batson v. Comm'r of Soc. Sec. Admin.*, 359
6 F.3d 1190, 1197 (9th Cir. 2004) (affirming a credibility finding where one of
7 several reasons was unsupported by the record); *Tommasetti v. Astrue*, 533 F.3d
8 1035, 1038 (9th Cir. 2008) (an error is harmless when "it is clear from the record
9 that the . . . error was inconsequential to the ultimate nondisability determination").
10 Additionally, the ALJ did address Plaintiff's nausea symptoms by incorporating a
11 limitation into the RFC that required Plaintiff to have ready access to a restroom
12 _____
13 made part of the evidence contained in the administrative record that is subject to
14 this Court's substantial evidence review. *Brewes v. Comm'r of Soc. Sec. Admin.*,
15 682 F.3d 1157, 1163 (9th Cir. 2012); *see Ruth v. Berryhill*, No. 1:16-CV-0872-PK,
16 2017 WL 4855400, at *8-*11 (D. Or. Oct. 26, 2017) (citing other district court
17 decisions in the Ninth Circuit holding that that new evidence that the Appeals
18 Council looked at and then rejected did not become part of the administrative
19 record subject to the Court's substantial evidence review). Plaintiff did not
20 challenge the Appeals Council's rejection of the evidence. ECF No. 15 at 11-20.

1 throughout the workday. Tr. 62. Plaintiff has not established harmful error in the
2 ALJ's evaluation of Plaintiff's symptom testimony.

3 2. *Improvement with Treatment*

4 The ALJ found Plaintiff's symptom complaints were inconsistent with
5 Plaintiff's record of improvement with treatment. Tr. 63-64. The effectiveness of
6 treatment is a relevant factor in determining the severity of a claimant's symptoms.
7 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3) (2011); *Warre v. Comm'r of Soc. Sec.*
8 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (determining that conditions
9 effectively controlled with medication are not disabling for purposes of
10 determining eligibility for benefits); *Tommasetti*, 533 F.3d at 1040 (recognizing
11 that a favorable response to treatment can undermine a claimant's complaints of
12 debilitating pain or other severe limitations). Here, the ALJ noted that several of
13 Plaintiff's impairments showed improvement with treatment. Tr. 63-64; *see, e.g.*,
14 Tr. 1263 (Plaintiff reported past relief from physical therapy); Tr. 1284 (Plaintiff
15 reported some present improvement in left shoulder pain with physical therapy);
16 Tr. 1311 (range of motion and grip strength improved after carpal tunnel release
17 surgery). Plaintiff failed to challenge this finding and thus has not demonstrated
18 that the ALJ erred. ECF No. 15 at 15-16; *see Carmickle*, 533 F.3d at 1161 n.2;
19 *Kim*, 154 F.3d at 1000. The ALJ reasonably concluded that Plaintiff's record of
20 improvement was inconsistent with the level of impairment he alleged.

1 3. *Failure to Follow Treatment Recommendations*

2 The ALJ found Plaintiff's symptom complaints were inconsistent with his
3 failure to follow treatment recommendations. Tr. 64. Noncompliance with
4 medical care or unexplained or inadequately explained reasons for failing to seek
5 medical treatment cast doubt on a claimant's subjective complaints. *Fair*, 885 F.2d
6 at 603; *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996). Here, the ALJ noted
7 that Plaintiff declined to wear the wrist braces his physician recommended for
8 carpal tunnel syndrome. Tr. 64; *see* Tr. 1268, 1273. Plaintiff failed to challenge
9 this finding and thus has not demonstrated that the ALJ erred. ECF No. 15 at 15-
10 16; *see Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000. The ALJ
11 reasonably concluded that Plaintiff's failure to comply with recommended
12 treatment was inconsistent with his symptom testimony.

13 4. *Inconsistent Statements*

14 The ALJ found Plaintiff's symptom reporting was undermined by his
15 inconsistent statements in the record. Tr. 65. In evaluating a claimant's symptom
16 claims, an ALJ may consider the consistency of an individual's own statements
17 made in connection with the disability review process with any other existing
18 statements or conduct made under other circumstances. *Smolen v. Chater*, 80 F.3d
19 1273, 1284 (9th Cir. 1996) (The ALJ may consider "ordinary techniques of
20 credibility evaluation," such as reputation for lying, prior inconsistent statements

1 concerning symptoms, and other testimony that “appears less than candid.”);
2 *Thomas*, 278 F.3d at 958-59. Additionally, it is well-settled in the Ninth Circuit
3 that conflicting or inconsistent statements concerning drug use can contribute to an
4 adverse credibility finding. *Thomas*, 278 F.3d at 959.

5 Here, the ALJ observed several instances where Plaintiff’s statements were
6 inconsistent. For example, the ALJ noted Plaintiff inconsistently reported his
7 marijuana use. Tr. 65; *see* Tr. 1244 (Plaintiff reported he had tried marijuana in
8 the past); Tr. 1233 (Plaintiff reported self-medicating with marijuana); Tr. 1236
9 (Plaintiff reported smoking marijuana in the past); Tr. 1250 (Plaintiff reported
10 occasional marijuana use); Tr. 1299 (Plaintiff reported weekly marijuana use); Tr.
11 1306-07 (same); Tr. 1368 (Plaintiff reported he has smoked a little marijuana and
12 his last use was six months ago). The ALJ also noted that Plaintiff gave
13 inconsistent explanations for why he left his last job. Tr. 65; *compare* Tr. 1233
14 (Plaintiff reported he “voluntarily terminated his employment because he felt his
15 employer was not being honest with him”) *with* Tr. 1165 (Plaintiff reported to the
16 SSA that he stopped working because of his conditions). Plaintiff failed to
17 challenge these findings and thus has not demonstrated that the ALJ erred. ECF
18 No. 15 at 15-16; *see Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000. The
19 ALJ reasonably concluded that Plaintiff’s inconsistent statements undermined his
20 overall symptom testimony.

1 5. *Symptom Exaggeration*

2 The ALJ found Plaintiff's symptom reporting was undermined by evidence
3 in the record that Plaintiff exaggerated his symptoms. Tr. 65. The tendency to
4 exaggerate provided a permissible reason for discounting Plaintiff's reported
5 symptoms. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (the
6 ALJ appropriately considered Plaintiff's tendency to exaggerate when assessing
7 Plaintiff's credibility, which was shown in a doctor's observation that Plaintiff was
8 uncooperative during cognitive testing but was "much better" when giving reasons
9 for being unable to work.). Here, the ALJ identified a treatment note where
10 Plaintiff's Owestry score placed him in a category where Plaintiff was either bed-
11 bound or exaggerating his symptoms. Tr. 65; *see* Tr. 1399. In light of Plaintiff's
12 robust daily activities, discussed *infra*, the ALJ reasonably relied on this evidence
13 to conclude Plaintiff had exaggerated his symptoms. Tr. 65. Additionally, the ALJ
14 noted that although Plaintiff reported that his orthopedist wanted to perform neck
15 surgery prior to Plaintiff's carpal tunnel release surgery, Tr. 1001, Plaintiff's
16 treatment records did not corroborate this report. Tr. 65; *see* Tr. 1403 ("At some
17 point the patient could become a candidate for surgical intervention for the neck
18 but I think that it would be reasonable for the patient to have physical therapy.").
19 Plaintiff failed to challenge these findings and thus has not demonstrated that the
20 ALJ erred. ECF No. 15 at 15-16; *see Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154

1 F.3d at 1000. The ALJ reasonably concluded that Plaintiff's exaggerated
2 statements undermined his overall symptom testimony.

3 6. *Daily Activities*

4 The ALJ found Plaintiff's symptom reporting was inconsistent with the
5 evidence of Plaintiff's daily activities. Tr. 65. The ALJ may consider a claimant's
6 activities that undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a
7 claimant can spend a substantial part of the day engaged in pursuits involving the
8 performance of exertional or non-exertional functions, the ALJ may find these
9 activities inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at
10 603; *Molina*, 674 F.3d at 1113. "While a claimant need not vegetate in a dark
11 room in order to be eligible for benefits, the ALJ may discount a claimant's
12 symptom claims when the claimant reports participation in everyday activities
13 indicating capacities that are transferable to a work setting" or when activities
14 "contradict claims of a totally debilitating impairment." *Molina*, 674 F.3d at 1112-
15 13. Here, the ALJ found that Plaintiff's alleged limitations were inconsistent with
16 Plaintiff's daily activities, which included personal care, performing housework
17 and yardwork, caring for his grandchildren, building and repairing fences,
18 performing household repairs, gardening, and riding a motorbike. Tr. 65; *see* Tr.
19 993-95, 1192-97. Plaintiff failed to challenge these findings and thus has not
20 demonstrated that the ALJ erred. ECF No. 15 at 15-16; *see Carmickle*, 533 F.3d at

1 1161 n.2; *Kim*, 154 F.3d at 1000. The ALJ reasonably concluded that Plaintiff's
2 alleged limitations were inconsistent with his daily activities.

3 **B. Medical Opinion Evidence**

4 Plaintiff challenges the ALJ's evaluation of the medical opinions of Miguel
5 Schmitz, M.D., Kayleen Islam-Zwart, Ph.D., Patricia Benn, LMHC, and Debra
6 Harris, M. Ed., LMHC. ECF No. 15 at 16-19.

7 There are three types of physicians: "(1) those who treat the claimant
8 (treating physicians); (2) those who examine but do not treat the claimant
9 (examining physicians); and (3) those who neither examine nor treat the claimant
10 [but who review the claimant's file] (nonexamining [or reviewing] physicians)."
11 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
12 Generally, a treating physician's opinion carries more weight than an examining
13 physician's, and an examining physician's opinion carries more weight than a
14 reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight
15 to opinions that are explained than to those that are not, and to the opinions of
16 specialists concerning matters relating to their specialty over that of
17 nonspecialists." *Id.* (citations omitted).

18 If a treating or examining physician's opinion is uncontradicted, the ALJ
19 may reject it only by offering "clear and convincing reasons that are supported by
20 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

1 “However, the ALJ need not accept the opinion of any physician, including a
2 treating physician, if that opinion is brief, conclusory and inadequately supported
3 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
4 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
5 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
6 may only reject it by providing specific and legitimate reasons that are supported
7 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
8 831).

9 *1. Dr. Schmitz*

10 Dr. Schmitz, Plaintiff’s treating orthopedic surgeon, opined on an
11 unspecified date that Plaintiff was capable of lifting less than ten pounds on an
12 occasional or frequent basis, that Plaintiff was capable of standing or walking for
13 four hours in an eight hour workday, that Plaintiff was capable of sitting for six
14 hours in an eight hour workday, that Plaintiff was capable of sitting for 20 minutes
15 before changing position, that Plaintiff was capable of standing and walking for ten
16 minutes before changing position, that Plaintiff needed the opportunity to shift at
17 will from sitting or standing/walking, that Plaintiff had no manipulative limitations
18 in the upper extremities, that Plaintiff would be off task for 16-25% of the
19 workday, that Plaintiff needed to lie down at unpredictable intervals during an
20 eight hour workday, that Plaintiff could occasionally twist and stoop, that Plaintiff

1 could never crouch or climb stairs or ladders, that Plaintiff could perform sedentary
2 and less than sedentary work, and that Plaintiff's impairments would cause him to
3 miss three days of work per month. Tr. 1470-72. The ALJ gave this opinion little
4 weight. Tr. 68. Because Dr. Schmitz's opinion was contradicted by Dr. Panek, Tr.
5 981-83, the ALJ was required to provide specific and legitimate reasons to reject
6 Dr. Schmitz's opinion. *Bayliss*, 427 F.3d at 1216.

7 First, the ALJ found Dr. Schmitz's opinion was inconsistent with the
8 longitudinal evidence, including Dr. Panek's hearing testimony. Tr. 67. An ALJ
9 may discredit physicians' opinions that are unsupported by the record as a whole.
10 *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004).
11 Additionally, an ALJ may credit the opinion of nonexamining expert who testifies
12 at hearing and is subject to cross-examination. *See Andrews v. Shalala*, 53 F.3d
13 1035, 1042 (9th Cir. 1995) (citing *Torres v. Sec'y of H.H.S.*, 870 F.2d 742, 744 (1st
14 Cir. 1989)). The opinion of a nonexamining physician may serve as substantial
15 evidence if it is supported by other evidence in the record and is consistent with it.
16 *Andrews*, 53 F.3d at 1041. Other cases have upheld the rejection of an examining
17 or treating physician based in part on the testimony of a non-examining medical
18 advisor when other reasons to reject the opinions of examining and treating
19 physicians exist independent of the non-examining doctor's opinion. *Lester*, 81
20 F.3d at 831 (citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989)

1 (reliance on laboratory test results, contrary reports from examining physicians and
2 testimony from claimant that conflicted with treating physician's opinion));
3 *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995) (rejection of examining
4 psychologist's functional assessment which conflicted with his own written report
5 and test results). Thus, case law requires not only an opinion from the consulting
6 physician but also substantial evidence (more than a mere scintilla but less than a
7 preponderance), independent of that opinion which supports the rejection of
8 contrary conclusions by examining or treating physicians. *Andrews*, 53 F.3d at
9 1039.

10 Here, the ALJ found Dr. Schmitz's opinion was inconsistent with the
11 longitudinal record. Tr. 67. The ALJ found that the longitudinal evidence showed
12 "[Plaintiff's] body has worn down to the point that he can no longer do [heavy
13 labor]," but that the medical evidence did not support a finding of complete
14 disability. Tr. 63-65; *see, e.g.*, Tr. 1219 (normal gait); Tr. 1251 (full range of
15 motion in extremities and spine; full strength); Tr. 1265 (mildly decreased range of
16 motion in back); Tr. 1276 (full range of motion in knees); Tr. 1282 (mildly reduced
17 range of motion in back); Tr. 1422 (mildly decreased range of motion in shoulder).
18 Additionally, the ALJ reasonably relied on the opinion of Dr. Panek, a reviewing
19 expert who testified at the hearing and was subject to cross-examination. Tr. 66-
20 67; *see* Tr. 972-85. Although Plaintiff challenges the ALJ's evaluation of Dr.

1 Schimtz's opinion, Plaintiff identifies no evidence to undermine the ALJ's
2 finding.⁴ ECF No. 15 at 17-18. The ALJ reasonably concluded that Dr. Schmitz's
3 opinion was inconsistent with the longitudinal record, including Dr. Panek's
4 testimony.

5 Second, the ALJ found Dr. Schmitz's opinion was unsupported. Tr. 67. The
6 Social Security regulations "give more weight to opinions that are explained than
7 to those that are not." *Holohan*, 246 F.3d at 1202. "[T]he ALJ need not accept the
8 opinion of any physician, including a treating physician, if that opinion is brief,
9 conclusory and inadequately supported by clinical findings." *Bray*, 554 at 1228.
10 Here, the ALJ noted that Dr. Schmitz's opinion did not indicate what medical
11 findings supported his opinion. Tr. 67; *see* Tr. 1470-72. Additionally, the ALJ
12 noted that Dr. Schmitz's opinion was not supported by his own treatment records.

13 _____
14 ⁴ Plaintiff argues that the ALJ had a duty to recontact Dr. Schmitz under SSR 96-
15 5p. ECF No. 15 at 17. SSR 96-5p pertains to the ALJ's obligation to recontact a
16 treating source "if the evidence does not support a treating source's opinion on any
17 issue reserved to the Commissioner and the adjudicator cannot ascertain the basis
18 of the opinion from the case record." SSR 96-5p, 1996 WL 374183, at *6.
19 Because Dr. Schmitz did not render an opinion on an issue reserved to the
20 Commissioner, Tr. 1470-72, SSR 96-5p does not apply.

1 Tr. 67; *see, e.g.*, Tr. 1403 (observing mild stenosis and recommending physical
2 therapy); Tr. 1406-07 (physical examination showing full motor strength, normal
3 gait, and negative Waddell's); Tr. 1423 (physical examination showing same and
4 recommending physical therapy and epidural injection). Plaintiff failed to
5 challenge this finding and thus has not demonstrated that the ALJ erred. ECF No.
6 15 at 17-18; *see Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000. The ALJ
7 reasonably concluded that Dr. Schmitz's opinion was entitled to less weight
8 because it was not supported.

9 Third, the ALJ found Dr. Schmitz's opinion was entitled to less weight
10 because Dr. Schmitz did not review collateral treatment records before offering his
11 opinion. Tr. 67-68. The extent to which a medical source is "familiar with the
12 other information in [the claimant's] case record" is relevant in assessing the
13 weight of that source's medical opinion. *See* 20 C.F.R. §§ 404.1527(c)(6),
14 416.927(c)(6) (2012). Here, the ALJ noted that Dr. Schmitz's opinion does not
15 indicate that he reviewed any collateral treatment notes before rendering his
16 opinion. Tr. 67-68; *see* Tr. 1470-72. In contrast, the ALJ relied on the opinion of
17 Dr. Panek, who reviewed the record in its entirety at the time of the hearing. Tr.
18 66; *see* Tr. 972. Plaintiff failed to challenge this finding and thus has not
19 demonstrated that the ALJ erred. ECF No. 15 at 17-18; *see Carmickle*, 533 F.3d at
20 1161 n.2; *Kim*, 154 F.3d at 1000. The ALJ reasonably concluded that Dr.

1 Schmitz's opinion was entitled to less weight because he did not review other
2 evidence in the record.

3 2. *Dr. Islam-Zwart*

4 Dr. Islam-Zwart evaluated Plaintiff on September 8, 2014, and opined
5 Plaintiff had moderate impairments in his ability to understand, remember, and
6 persist in tasks by following very short and simple instructions; perform activities
7 within a schedule, maintain regular attendance, and be punctual within customary
8 tolerances without special stereovision; learn new tasks; adapt to changes in a
9 routine work setting; make simple work-related decisions; communicate and
10 perform effectively in a work setting; maintain appropriate behavior in a work
11 setting; that Plaintiff would have marked impairments in his ability to understand,
12 remember, and persist in tasks by following detailed instructions; and complete a
13 normal work day and work week without interruptions from psychologically based
14 symptoms; and that Plaintiff's impairment would last for six months to
15 indefinitely. Tr. 1365. The ALJ gave this opinion little weight. Tr. 69. Because
16 Dr. Islam-Zwart's opinion was contradicted by Dr. Dowell, Tr. 1238-39, Dr.
17 Eather, Tr. 1019, and Dr. Kraft, Tr. 1042, the ALJ was required to provide specific
18 and legitimate reasons to reject Dr. Islam-Zwart's opinion. *Bayliss*, 427 F.3d at
19 1216.

1 Although Plaintiff challenges the ALJ's evaluation of Dr. Islam-Zwart's
2 opinion, Plaintiff does not develop any argument at all as to how the ALJ erred.
3 ECF No. 15 at 18-19. As such, the Court is not required to address this reason.
4 *See Carmickle*, 533 F.3d at 1161 n.2 (9th Cir. 2008). The Ninth Circuit explained
5 the necessity for providing specific argument:

6 The art of advocacy is not one of mystery. Our adversarial system relies on
7 the advocates to inform the discussion and raise the issues to the court.
8 Particularly on appeal, we have held firm against considering arguments that
9 are not briefed. But the term "brief" in the appellate context does not mean
10 opaque nor is it an exercise in issue spotting. However much we may
11 importune lawyers to be brief and to get to the point, we have never
12 suggested that they skip the substance of their argument in order to do so. It
13 is no accident that the Federal Rules of Appellate Procedure require the
14 opening brief to contain the "appellant's contentions and the reasons for
15 them, with citations to the authorities and parts of the record on which the
16 appellant relies." Fed. R. App. P. 28(a)(9)(A). We require contentions to be
17 accompanied by reasons.

18 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).⁵

19 Moreover, the Ninth Circuit has repeatedly admonished that the court will not
20 "manufacture arguments for an appellant" and therefore will not consider claims
that were not actually argued in appellant's opening brief. *Greenwood v. Fed.*
Aviation Admin., 28 F.3d 971, 977 (9th Cir. 1994). Despite Plaintiff's failure to

19 ⁵ Under the current version of the Federal Rules of Appellate Procedure, the
20 appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

1 brief the issue with specificity, the Court considered the ALJ's findings and
2 concludes they are legally sufficient.

3 First, the ALJ found Dr. Islam-Zwart's opinion was internally inconsistent.
4 Tr. 68. An ALJ may reject opinions that are internally inconsistent. *Nguyen v.*
5 *Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996). An ALJ is not obliged to credit
6 medical opinions that are unsupported by the medical source's own data.
7 *Tommasetti*, 533 F.3d at 1041. The ALJ noted Dr. Islam-Zwart's opinion that
8 Plaintiff had significant limitations in his ability to learn and perform tasks was
9 inconsistent with her opinion that Plaintiff could "minimize or eliminate" his
10 barriers to employment through vocational training or services. Tr. 68; *see* Tr.
11 1365. Additionally, the ALJ found that Dr. Islam-Zwart's opinion that Plaintiff
12 had marked cognitive limitations was inconsistent with her recommendation that
13 Plaintiff did not need a protective payee. *Id.* Plaintiff failed to challenge this
14 finding and thus has not demonstrated that the ALJ erred. ECF No. 15 at 18-19;
15 *see Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000. The ALJ reasonably
16 concluded that Dr. Islam-Zwart's opinion was internally inconsistent.

17 Second, the ALJ found Dr. Islam-Zwart's opinion was inconsistent with the
18 longitudinal medical evidence, including evidence that Plaintiff's condition
19 improved with treatment. Tr. 69. A medical opinion may be rejected if it is
20 unsupported by medical findings. *Bray*, 554 F.3d at 1228; *Batson*, 359 F.3d at

1 1195; *Thomas*, 278 F.3d at 957; *Tonapetyan*, 242 F.3d at 1149; *Matney v. Sullivan*,
2 981 F.2d 1016, 1019 (9th Cir. 1992). The ALJ found Dr. Islam-Zwart's opined
3 limitations were inconsistent with Plaintiff's treatment record, which showed
4 inconsistent medication compliance and improvement with medication and
5 counseling. Tr. 69; *see, e.g.*, Tr. 1254 (Plaintiff inconsistently taking Zoloft); Tr.
6 1257 (Xanax prescribed for use as needed); Tr. 1258 (Plaintiff has been off Zoloft
7 for 1-2 weeks after Zoloft was increased at last visit); Tr. 1273 (mood improved
8 with medication and counseling); Tr. 1278 (same); Tr. 1284 (same). The ALJ also
9 noted that Plaintiff's performance on Dr. Islam-Zwart's mental status examination
10 showed some improvement over his performance on the same examination
11 administered by Dr. Dowell, who opined Plaintiff had no psychological limitations.
12 Tr. 69; *compare* Tr. 1370 with Tr. 1238. Plaintiff failed to challenge these findings
13 and thus has not demonstrated that the ALJ erred. ECF No. 15 at 18-19; *see*
14 *Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000. The ALJ reasonably
15 concluded Dr. Islam-Zwart's opinion was inconsistent with the longitudinal
16 treatment record, including Plaintiff's record of improvement.

17 Third, the ALJ found Dr. Islam-Zwart's opinion was inconsistent with
18 Plaintiff's daily activities. Tr. 69. An ALJ may discount a medical source opinion
19 to the extent it conflicts with the claimant's daily activities. *Morgan v. Comm'r of*
20 *Soc. Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999). Here, the ALJ noted that

1 Plaintiff reported good activities of daily living to Dr. Islam-Zwart, including
2 independent self-care, household chores, cooking, grocery shopping, playing cards,
3 watching television, gardening, and spending time with his children and
4 grandchildren. Tr. 1369. Plaintiff failed to challenge this finding and thus has not
5 demonstrated that the ALJ erred. ECF No. 15 at 18-19; *see Carmickle*, 533 F.3d at
6 1161 n.2; *Kim*, 154 F.3d at 1000. The ALJ reasonably concluded that these daily
7 activities were inconsistent with the level of impairment Dr. Islam-Zwart opined.

8 *3. Ms. Benn and Ms. Harris*

9 Ms. Benn counseled Plaintiff between February and April 2014, and opined
10 on June 18, 2014 that Plaintiff had difficulty controlling his anger, feeling
11 motivated, and managing his emotions, and that Plaintiff would have difficulty
12 maintaining a consistent work schedule and being a reliable, productive employee.
13 Tr. 1232-34. Ms. Harris counseled Plaintiff between January and December 2015,
14 and opined on August 23, 2016 that Plaintiff was a physical safety risk due to his
15 lack of sense of danger or potential risk when engaging in activities and that
16 Plaintiff showed improvement when taking medications but would self-discontinue
17 his medication. Tr. 1352-53. The ALJ gave both opinions little weight. Tr. 69-70.
18 As LMHCs, Ms. Benn and Ms. Harris are not acceptable medical sources. 20

1 C.F.R. §§ 404.1502, 416.902⁶ (acceptable medical sources are licensed physicians,
2 licensed or certified psychologists, licensed optometrists, licensed podiatrists,
3 qualified speech-language pathologists, licensed audiologists, licensed advanced
4 practice registered nurses, and licensed physician assistants). An ALJ is required
5 to consider evidence from non-acceptable medical sources. 20 C.F.R. §§
6 404.1527(f), 416.927(f).⁷ An ALJ must give reasons “germane” to each source in
7 order to discount evidence from non-acceptable medical sources. *Ghanim*, 763
8 F.3d at 1161.

9 Plaintiff challenges the ALJ’s evaluation of these opinions but fails to
10 identify error in the ALJ’s analysis. ECF No. 15 at 18-19. Plaintiff misconstrues
11 the ALJ’s findings to argue that the ALJ rejected the opinions of Ms. Benn and Ms.
12 Harris because they are not medically acceptable sources. *Id.* To the contrary, the
13 ALJ identified these sources as “other sources,” and then proceeded to identify
14 several germane reasons to reject each opinion. Tr. 69-70.

15
16 ⁶ Prior to March 27, 2017, the definition of an acceptable medical source was
17 located at 20 C.F.R. §§ 404.1513, 416.913 (2013).

18 ⁷ Prior to March 27, 2017, the requirement that an ALJ consider evidence from
19 non-acceptable medical sources was located at 20 C.F.R. §§ 404.1513(d),
20 416.913(d) (2013).

1 First, the ALJ rejected both Ms. Benn's opinion and Ms. Harris' opinion
2 because they were not supported. Tr. 69-70. Failure to provide support or
3 explanation is a germane reason to discredit opinion of nonacceptable medical
4 source. *Molina*, 674 F.3d at 1111-12. Here, the ALJ observed that although both
5 Ms. Benn and Ms. Harris counseled Plaintiff for a period of time, neither source
6 released any counseling treatment notes to support their opinions. Tr. 69.
7 Additionally, the ALJ noted that Ms. Harris failed to explain the durational level of
8 the impairments she opined. Tr. 70. Plaintiff failed to challenge these findings and
9 thus has not demonstrated that the ALJ erred. ECF No. 15 at 18-19; *see*
10 *Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000. Ms. Benn's and Ms.
11 Harris' failure to provide support for their opinions was a germane reason to
12 discredit both opinions.

13 Second, the ALJ rejected both Ms. Benn's opinion and Ms. Harris' opinion
14 because they were inconsistent with the medical evidence. Tr. 69-70.
15 Inconsistency with the medical evidence is a germane reason for rejecting lay
16 witness testimony. *Bayliss*, 427 F.3d at 1218. Here, the ALJ found that the severe
17 limitations in both opinions were inconsistent with Plaintiff's longitudinal
18 treatment record, which showed minimal mental health problems and improvement
19 with treatment. Tr. 69-70; *see, e.g.*, Tr. 1273 (mood improved with medication and
20 counseling); Tr. 1278 (same); Tr. 1284 (same). The ALJ specifically noted that the

1 assessed limitations were inconsistent with Dr. Dowell's examination, who is an
2 acceptable medical source, which examination found no psychological limitations.
3 Tr. 69. Plaintiff failed to challenge this finding and thus has not demonstrated that
4 the ALJ erred. ECF No. 15 at 18-19; *see Carmickle*, 533 F.3d at 1161 n.2; *Kim*,
5 154 F.3d at 1000. The inconsistencies between the medical evidence and Ms.
6 Benn's and Ms. Harris' opinions provide germane reason to discredit both
7 opinions.

8 **C. Step Two**

9 Plaintiff challenges the ALJ's failure to identify depression as a severe
10 impairment at step two. ECF No. 15 at 13-15.

11 At step two of the sequential process, the ALJ must determine whether
12 claimant suffers from a "severe" impairment, i.e., one that significantly limits his
13 physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c),
14 416.920(c) (2012). When a claimant alleges a severe mental impairment, the ALJ
15 must follow a two-step "special technique" at steps two and three. First, the ALJ
16 must evaluate the claimant's "pertinent symptoms, signs, and laboratory findings
17 to determine whether [he or she has] a medically determinable impairment." 20
18 C.F.R. §§ 404.1520a, 416.920a (2011). Second, the "degree of functional
19 limitation resulting from [the claimant's] impairments" in four broad areas of
20 functioning: activities of daily living; social functioning; concentration, persistence

1 or pace; and episodes of decompensation. *Id.* Functional limitation is measured as
2 “none, mild, moderate, marked, and extreme.” *Id.* If limitation is found to be
3 “none” or “mild,” the impairment is generally considered to not be severe. *Id.* If
4 the impairment is severe, the ALJ proceeds to determine whether the impairment
5 meets or is equivalent in severity to a listed mental disorder. *Id.*

6 Step two is “a de minimus screening device [used] to dispose of groundless
7 claims.” *Smolen*, 80 F.3d at 1290. “Thus, applying our normal standard of review
8 to the requirements of step two, [the Court] must determine whether the ALJ had
9 substantial evidence to find that the medical evidence clearly established that
10 [Plaintiff] did not have a medically severe impairment or combination of
11 impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).

12 Plaintiff asserts the ALJ should have identified depression as a severe
13 impairment at step two. ECF No. 15 at 13-14. However, Plaintiff’s argument is
14 based entirely on the assumption that the ALJ should have credited the opinions of
15 Dr. Islam-Zwart, Ms. Benn, and Ms. Harris. *Id.* As discussed *supra*, Plaintiff
16 failed to develop any argument to support Plaintiff’s assertion that the ALJ erred in
17 evaluating the mental impairment opinion evidence. *Carmickle*, 533 F.3d at 1161
18 n.2; *Kim*, 154 F.3d at 1000. Therefore, Plaintiff does not establish subsequent
19 error in the ALJ’s step two analysis. The ALJ reasonably relied on the opinions of
20

1 Dr. Dowell, Dr. Eather, and Dr. Kraft to conclude depression was not a severe
2 impairment. Tr. 59-60, 68.

3 **D. Step Five**

4 Plaintiff challenges the ALJ's step five analysis for being based on an RFC
5 Plaintiff argues fails to incorporate all of Plaintiff's limitations. ECF No. 15 at 19-
6 20. However, Plaintiff's argument is based entirely on the assumption that the ALJ
7 erred in considering the medical opinion evidence and Plaintiff's symptom claims.
8 *Id.* For reasons discussed throughout this decision, the ALJ's consideration of
9 Plaintiff's symptom testimony and the medical opinion evidence is legally
10 sufficient. Thus, the vocational expert's testimony was not based on an incomplete
11 hypothetical, and the ALJ did not err in determining Plaintiff was capable of
12 performing other work in the national economy.

13 **CONCLUSION**

14 Having reviewed the record and the ALJ's findings, this court concludes the
15 ALJ's decision is supported by substantial evidence and free of harmful legal error.
16 Accordingly, **IT IS HEREBY ORDERED:**

- 17 1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is **DENIED**.
- 18 2. Defendant's Motion for Summary Judgment, ECF No. 16, is **GRANTED**.
- 19 3. The Court enter **JUDGMENT** in favor of Defendant.

1 The District Court Executive is directed to file this Order, provide copies to
2 counsel, and **CLOSE THE FILE.**

3 DATED February 6, 2019.

4 s/Mary K. Dimke
5 MARY K. DIMKE
6 UNITED STATES MAGISTRATE JUDGE
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